THE HON'BLE SRI JUSTICE T.SUNIL CHOWDARY

SECOND APPEAL No.297 of 2005

April 04, 2014

Between:

Pallepati Kanda Rao, S/o.Mangapathi Rao

... Appellant/
Appellant/Defendant No.1

AND

Pallepati Susheela, W/o.Mangapathi Rao
And others

... Respondents/Respondents/
Plaintiffs and Defendant No.2

THE HON'BLE SRI JUSTICE T. SUNIL CHOWDARY

SECOND APPEAL No.297 OF 2005

JUDGMENT:

This second appeal is preferred by the unsuccessful first defendant challenging the decree and judgment dated 26.4.2004 passed in A.S.No.40 of 2001 on the file of the IV Additional District

Judge, Warangal, confirming the decree and judgment dated 29.1.2001 in O.S.No.156 of 1996 on the file of the I Additional Senior Civil Judge, Warangal, wherein plaintiffs 1 to 6 are declared as owners and possessors of suit schedule properties and granted permanent injunction restraining the defendants, their agents and men from interfering with suit schedule properties. The parties are hereinafter referred to as they are arrayed in the suit, for the sake of convenience.

2. The case of the plaintiffs is that the first defendant is the son of late Mangapathi Rao through his first wife. The first plaintiff is second wife of late Mangapathi Rao. Plaintiffs 2 to 6 and one Smt.Hema Devi are the daughters of late Mangapathi Rao and first plaintiff. Late Mangapathi Rao and his three brothers had partitioned joint family properties in the year 1952, late Mangapathi Rao got the properties situated at Chintha Nekkonda, Parvatha Giri Mandal, Warangal District. One of the brothers of late Mangapathi Rao by name Venkateswara Rao who was a leper and unmarried, got lesser share in the partition. The said Venkateswara Rao stayed along with Mangapathi Rao. Mangapathi Rao had purchased an extent of Acs.13.36 guntas in survey No.443 with his own money. Disputes arose between first defendant and late Mangapathi Rao in the year 1969. At the advise of elders, late Mangapathi Rao had given an extent of Acs.15.62 guntas in Survey Nos.257/A, 346, 393, 184 and 185 and two rooms in the house bearing No.3-106 to the first defendant towards his share in the joint family properties. The first defendant was also given separate land i.e., School Kottam by taking back two rooms in house bearing No.3-106. The first defendant has been in possession and enjoyment of the land fell to

his share since 1969 onwards. Late Mangapathi Rao had given landed property to his daughters at the time of their respective marriages. Late Mangapathi Rao sold landed property for performing marriages of his daughters. He performed the marriage of his daughter, by name Hema Devi, in the year 1979 and gifted land admeasuring Ac.10.00. On 14.8.1981, when Mangapathi Rao delivering an extent of Ac.1.10 guntas in survey Nos.760, 906 to 909 to his vendees, the first defendant intervened and beat late Mangapathi Rao who in turn lodged a complaint with the Police against the first defendant. The first defendant has faced criminal trial in that connection.

3. Late Mangapathi Rao and his brother Venkateswara Rao have filed O.S.No.169 of 1981 on the file of I Additional Subordinate Judge, Warangal and obtained interim injunction. The first defendant filed O.S.No.62 of 1984 on the file of II Additional Subordinate Judge, Warangal for partition of the property scheduled therein. Mangapathi Rao filed written statement inter alia contending that there was an earlier partition between himself and first defendant. O.S.No.169 of 1981 filed by Mangapathi Rao was decreed. O.S.No.62 of 1984 filed by first defendant herein was dismissed on 12.9.1993 for non-prosecution. Late Mangapathi Rao, during his life time, in a sound and disposing state of mind, executed a Will on 03.8.1995 bequeathing his properties in favour of the plaintiffs. After death of Mangapathi Rao on 05.9.1995, the plaintiffs filed a petition before the Mandal Revenue Officer (MRO) for mutation of their names for which the first defendant objected. The MRO mutated the name of first defendant on the ground that he is entitled for half share in the properties of late Mangapathi Rao. The plaintiffs herein have filed

appeal before the Revenue Divisional Officer (RDO) challenging the order of the MRO and the same was dismissed. The plaintiffs are taking steps to challenge the order of the RDO. With the help of pattadar passbook issued in favour of the first defendant, he is trying to dispossess the plaintiffs from the suit schedule property. Hence the suit.

4. The first defendant filed written statement admitting the relationship between himself and the plaintiffs and the factum of death of Manapathi Rao. Inter alia, it was contended that except survey No.443, remaining suit schedule properties are ancestral properties. Survey No.443 consisting of Acs.13.38 guntas was purchased by Mangapathi Rao out of the income derived from ancestral properties. An extent of Acs.14.49 guntas in survey Nos.257/A, 346 and 393, which fell to the share of Venkateswara Rao, was allotted to the first defendant under settlement in the year 1974. Ever since, he has been in possession and enjoyment of the same. The first plaintiff was always used to harass him and **under those circumstances, some land was set apart to first defendant for enjoyment.** There were longstanding disputes between late Mangapathi Rao and first defendant eventually leading to filing of civil and criminal cases. The village elders in order to resolve the dispute made an award on 23.6.1991, which was accepted and acted upon by the parties. As per the terms of the award, first defendant was allotted Acs.2.21 guntas in survey No.434 together with a well, Acs.5.13 guntas in survey No.378/c, Acs.2.06 guntas in survey No.325, Acs.3.00 in survey No.390/D and Acs.0.10 guntas of Ponnamvari Peradu. One of the terms of the award is that civil and criminal cases pending between late Mangapathi Rao and first defendant should be withdrawn. Late

Mangapathi Rao allowed first defendant to take possession of Acs.4.38 guntas in survey No.443 apart from the land allotted to him under the award dated 23.6.1991. In view of the award passed by the village elders, first defendant did not prosecute O.S.No.62 of 1984. It is absolutely false to state that late Mangapathi Rao had executed Will dated 03.8.1995 bequeathing the properties in favour of the plaintiffs in a sound and disposing state of mind. The plaintiffs have forged the signature of late Mangapathi Rao and created the Will for the purpose of this suit. The first defendant has been in possession and enjoyment of suit schedule property. Hence the suit is liable to be dismissed.

5. The second defendant filed memo adopting the written statement filed by the first defendant.

6. Basing on the rival contentions, the trial court framed the following issues:

1. Whether suit schedule properties were exclusively belongs to late Mangapathi Rao? If so, plaintiffs 1 to 6 are the successors of late Mangapathi Rao?

2. Whether the plaintiffs are in possession over (*sic,* of) the suit schedule lands?

3. Whether the plaintiffs are entitled for declaration of title of (*sic,* to) suit schedule properties and perpetual injunction as prayed for?

4. To what relief?

7. Before the trial court, on behalf of the plaintiffs, P.Ws.1 to 5 were examined and Exs.A1 to A12 were marked. On behalf of the first defendant, D.Ws.1 to 3 were examined and Exs.B1 to B5 were marked.

8. After analysing the oral, documentary evidence and other

material available on record, the trial court decreed the suit as prayed for. Feeling aggrieved by the decree and judgment of the trial court, the first defendant preferred the first appeal and the same was dismissed. The unsuccessful first defendant preferred this second appeal.

9. This second appeal was admitted basing on the following substantial questions of law.

1. Whether a declaration can be granted contrary to the title deed and pattadar pass book issued under R.O.R. Act?

2. Whether the presumption of the title and ownership conferred by issuing of title deeds and pattadar pass books under R.O.R. Act can be overlooked without any rebuttal evidence?

3. Whether the presumption of title and ownership can be superseded by a Will deed without any rebuttal evidence in respect of the title and ownership conferred under R.O.R. Act?

10. The contention of learned counsel for the appellant/first defendant, Sri Y.Rama Rao, is three fold: (1) the courts below ought not to have decreed the suit as the plaintiffs failed to prove the factum of partition between late Mangapathi Rao and the first defendant in the year 1969; (2) the findings recorded by the courts below are contrary to the entries made in Ex.B2; and (3) the findings recorded by the courts below are perverse thereby legally not sustainable. The contention of Sri Patibandla Prabhakar, learned counsel appearing for the respondents 1 to 6/plaintiffs is two fold: (1) this court shall not interfere with the concurrent findings of fact recorded by courts below in view of Section 100 of CPC; and (2) the courts below have assigned cogent and valid reasons to its findings; therefore the appeal is not maintainable.

Point Nos.1 to 3:

11. The gist of the questions of law revolves around Ex.B2 pattadar passbook and Ex.A7 Will; hence I am inclined to address the questions of law simultaneously, in order to avoid recapitulation of facts and evidence.

12. To substantiate the case, the third plaintiff examined herself as P.W.1 and got marked Exs.A.1 to A.12. P.Ws.2 and 3 are the attestors and P.W.4 is the scribe of Ex.A7 Will. P.W.5 was examined to prove the factum of partition between late Mangapathi Rao and first defendant in the year 1969. To dislodge the case of the plaintiffs, the first defendant examined himself as D.W.1 and got marked Exs.B1 to B5. D.W.2 was examined to prove the factum of settlement on 23.6.1991. D.W.3 was examined to prove the disputes between the parties.

13. Before adverting to the concurrent findings of fact recorded by the courts below, it is apposite to refer to the admitted facts of the case on hand. The first wife of late Mangapathi Rao died three days after she gave birth to a male child i.e., the first defendant. The first plaintiff is the second wife, and plaintiffs 2 to 6 and one Hema Devi are the daughters of late Mangapathi Rao. Late Mangapathi Rao got the landed properties situated in Chintha Nekkonda and in the family partition effected in the year 1952.

One of the brothers of late Mangapathi Raohe by name Venkateswara Rao, who was leper and unmarried, got minor share of fertile land. The said Venkateswara Rao has been under the care and custody of late Mangapathi Rao during his life time. The first defendant has faced criminal trial as he beat late Mangapathi Rao in the year 1981. Late Mangapathi Rao and Venkateswara Rao have filed O.S.No.169 of 1981 against the first defendant for

perpetual injunction in respect of suit schedule properties and some other properties, and the said suit was decreed. The defendant herein filed A.S.No.47 of 1998 on the file of IV Additional District Judge, Warangal and the same was dismissed. The first defendant herein preferred S.A.No.242 of 2005, which is also being disposed of by separate judgment today. The first defendant filed O.S.No.62 of 1984 against late Mangapathi Rao seeking partition of the joint family properties and the same was dismissed on 12.9.1993 for non-prosecution. There is no cordial relationship between the first defendant and other family members including late Mangapathi Rao for obvious reasons.

14. Section 101 of the Indian Evidence Act mandates that burden of proof lies on the person who asserts a particular fact and desires the court to give judgment on such fact. Establishment of the following two aspects are *sine qua non* in order to succeed the suit by the plaintiffs herein: (1) late Mangapathi Rao and first defendant have partitioned joint family properties in the year 1969; and (2) late Mangapathi Rao has executed Ex.A7 Will dated 03.8.1995 in a sound and disposing state of mind bequeathing the suit schedule properties in favour of the plaintiffs. Once the plaintiffs discharge the burden lies on them, the onus shifts on the first defendant to establish the factum of partition effected on 23.6.1991. Once both parties adduce oral and documentary evidence, the burden of proof loses its significance.

15. In the written statement, the first defendant has taken a plea that an extent of Acs.14.49 guntas in survey No.257/A, 346 and 393, which fell to the share of Venkateswara Rao was allotted to him in the year 1974, ever since he has been in possession and enjoyment of the same. In the cross-examination, D.W.1 did not

deny the suggestion that one Jaya Prakash is the adopted son of Venkateswara Rao. He simply stated that he does not know whether Venkateswara Rao adopted Jaya Prakash or not. The tenor of the cross-examination of D.W.1 did not fully support the stand taken by him in the written statement. If really, Jaya Prakash was not adopted son of Venkateswara Rao, certainly he might have denied the suggestion without any hesitation. In Exs.A3 to A6 pahanis the name of Jaya Prakash is shown as son of Venkateswara Rao and its recitals further reveal that Jaya Prakash has been in possession and enjoyment of the landed property fell to the share of Venkateswara Rao. The first defendant did not take any steps to falsify the recitals of Exs.A3 to A6 pahanis. As per the testimony of P.Ws.1 to 5, Jaya Prakash has been in possession and enjoyment of the property fell to the share of Venkateswara Rao. Even as per the testimony of D.W.1, late Mangapathi Rao looked after the welfare of Venkateswara Rao. It is not the case of the first defendant that he has looked after the welfare of Venkateswara Rao. Late Mangapathi Rao and Venkateswara Rao have filed O.S.No.169 of 1981 against the first defendant seeking perpetual injunction restraining him from interfering with the landed property fell to their share. The first defendant miserably failed to prove that he has been in possession and enjoyment of the landed property fell to the share of Venkateswara Rao.

16. As per the testimony of P.Ws.1 to 5, late Mangapathi Rao and first defendant have partitioned the joint family properties in the year 1969. Ever since, the first defendant has been residing separately by enjoying the properties fell to his share. As per the testimony of D.W.1, himself and his father have partitioned the

joint family properties on 23.6.1991 in the presence of village elders. His testimony further reveals that as per the terms of award, he got Acs.13.00 of land. As per the contention of the first defendant, late Mangapathi Rao permitted him to cultivate an extent of Ac.6.00 in survey No.443.

17. As per the testimony of P.W.1, late Mangapathi Rao executed Ex.A7 Will dated 03.8.1995 bequeathing his properties in favour of the plaintiffs. The first defendant taken a specific plea that the Will dated 03.8.1995 is a created one. It is a settled principle of law that the propounder of the Will has to dispel the suspicious circumstances surrounding the execution of the Will. A fascicular reading of Section 68 of the Indian Evidence Act with Section 63 of Indian Succession Act mandates that one of the attestors to the Will must be examined to prove the same. Let me examine the facts of the case on hand with reference to the above principle.

18. P.Ws.2 and 3 are the attestors and P.W.4 is the scribe of Ex.A.7 Will. As per the testimony of P.Ws.2 and 3, the scribe has prepared the Will as per the instructions of late Mangapathi Rao. As per the testimony of P.W.4, he scribed Ex.A7 Will as per the instructions of late Mangapathi Rao. As per the testimony of P.W.2, P.W.3 and P.W.4, late Mangapathi Rao had subscribed his signature on the Will after satisfying himself with the recitals therein. Absolutely there is no material on record to establish that Ex.A7 Will does not bear the signature of late Mangapathi Rao. In the cross-examination of P.W.2, P.W.3 and P.W.4, nothing is elicited to establish that Ex.A7 Will is a forged and created one. The testimony of P.Ws.2 to 4 is consistent, cogent, convincing,

coherent and corroborating with each other in all aspects. In view of strained relations between the first defendant and his step-sisters, in order to avoid future litigation, the possibility of execution of Will (Ex.A7) by late Mangapathi Rao is more probable and convincing. There are no suspicious circumstances to doubt the genuineness of Ex.A7 Will. The material placed before the court clinchingly establishes that late Mangapathi Rao had executed Will (Ex.A7) in a sound and disposing state of mind at his own volition. Suffice to say, when proof of execution of Will is accepted, the last wish of the testator has to be respected and disposition in the Will are to be given effect to. By examining P.W.2, P.W.3 and P.W.4, the plaintiffs clearly proved the recitals of Ex.A7 Will.

19. The court shall not lose sight of the ground realities while appreciating the rival contentions of the parties to the suit. The court has to keep in mind the socio-economic conditions and the well recognised custom prevailed in the locality to which the parties belong. In the villages, the family members effect the partition of landed property orally in the presence of village elders out of mutual trust and confidence. It is not uncommon in agricultural families to partition the properties orally more particularly in 1950s and 60s. The first defendant has taken the following plea in the written statement "*the first plaintiff always used to harass this defendant frequently; under those circumstances some land was set apart to this defendant for enjoyment*". It appears that the first defendant has taken this slippery plea so as to overcome the adverse situation at the time of trial. Taking this type of plea, the first defendant by necessary implication has accepted the property division between himself

and his father. Normally the parties to the suit may select the witnesses who support their claim. As per the testimony of D.W.3, himself and other village elders have settled the disputes between late Mangapathi Rao and first defendant nearly 25 years back. For more clarity, it is apposite to extract hereunder the relevant portion of cross-examination of D.W.3.

> "It is true from the year 1969 onwards Mangapathi Rao and first defendant are residing separately, enjoying their respective properties and maintaining separate mess. It is true that after the year 1969, Mangapathi Rao sold some of his properties fallen to his share to meet his personal necessities".

The first defendant's own witness (D.W.3) fully supported the version of the plaintiffs that late Mangapathi Rao and the first defendant have partitioned the joint family properties in the year 1969.

20. Admittedly, there was strained relationship between late Mangapathi Rao and first defendant since long time. In the year 1979, late Mangapathi Rao gifted an extent of Acs.10.00 of land in favour of his fifth daughter, Hema Devi, at the time of her marriage. Late Mangapathi Rao sold landed property individually to perform the marriage of his daughters after 1969. It is also not in dispute that the first defendant sold an extent of Acs.17.19 guntas of joint family property to third parties. If really, there was no partition in the year 1969, how the first defendant sold the joint family property individually and how he allowed late Mangapathi Rao to sell the joint family property to others individually. This is one of the important factors, which negates the contention of the first defendant. Even as per the averments in the written statement, an extent of Acs.13.36 guntas in survey No.443 is the

self-acquired property of late Mangapathi Rao. Therefore late Mangapathi Rao is entitled to dispose of the self acquired as he pleases.

21. As per the contention of the first defendant, the village elders settled the disputes between himself and his father and as per the award dated 23.6.1991, he got nearly Acs.13.00 of land. As per the contention of the first defendant, partition took place between himself and his father on 23.6.1991. As per the testimony of D.W.2, the village elders passed the award, which bear his signature (Ex.B1). The so called award was not marked in the trial court for non-payment of necessary stamp duty. The first defendant did not take any steps to mark the award at least in the first appellate court. Suffice to say, in order to consider the document, the same must be marked and proved as per the provisions of the Evidence Act. In the instant case, the so called award was not marked on behalf of the first defendant. The court shall not place any reliance on an unmarked document. An unmarked document is as good as a white paper. Late Mangapathi Rao has taken a specific plea in O.S.No.62 of 1984 that joint family properties were partitioned between himself and first defendant way back in the year 1969. It is an admitted fact that O.S.No.62 of 1984 was dismissed on 12.9.1993 for non-prosecution. The so called award was in the custody of first defendant as on 12.9.1993. In such circumstances, what prevented the first defendant to request the court to pass decree in O.S.No.62 of 1984 as per the terms and conditions of the award dated 23.6.1991. Inaction on the part of the first defendant fully supports the version of the plaintiffs about the previous partition. Even as per the recitals of Ex.A7 Will, late Mangapathi Rao and

the first defendant have partitioned the joint family properties in the year 1969. The material placed before the court clinchingly establishes that late Mangapathi Rao and the first defendant have partitioned the joint family properties in the year 1969 itself. Late Mangapathi Rao is legally entitled to dispose of the property fell to his share in the partition.

22. The first defendant placed much reliance on Ex.B2 pattadar passbook to prove the factum of partition in the year 1991. There is no mention in Ex.B2 that the first defendant got the suit schedule property as per the terms and conditions of the award dated 23.6.1991. Ex.B2 is silent with regard to the source of the title of the first defendant in respect of the property mentioned therein. Ex.B2 was issued in the year 1995. The material placed before the court clinchingly establishes that there were disputes between late Mangapathi Rao and the first defendant in respect of landed properties including suit schedule property since 1981. No doubt the court can place prima facie reliance on the entries made in the Record of Rights if the same is not disputed by the opposite party. The first defendant has not taken any steps to examine the concerned revenue people on what basis, they have issued Ex.B2 pattadar passbook. The pahanis filed by the plaintiffs negates the contention of the first defendant. The Revenue authorities have not taken into consideration Ex.A7 Will while issuing Ex.B2 pattadar passbook in favour of the first defendant. Viewed from any angle, much weight cannot be attached to Ex.B2. When there is a conflict between the declaration granted by the competent civil court and the entries in the RoR, the declaration granted by the competent civil court will prevail.

23. In the light of the foregoing discussion, I have no hesitation

to hold that the plaintiffs are entitled to for the relief of declaration and consequential injunction. The concurrent findings of fact recorded by the courts below with regard to factum of partition in the year 1969 and the validity of Ex.A7 Will are fully supported by the oral and documentary evidence. Viewed from any angle, I am unable to accede to the contention of the learned counsel for the appellant that the findings recorded by the courts below are perverse and thereby legally not sustainable. The courts below have assigned cogent and valid reasons to its findings. There is no question of law much less substantial question of law which warrants interference of this court.

24. In the result, the second appeal is dismissed, confirming the decree and judgment dated 26.4.2004 passed in A.S.No.40 of 2001 on the file of the IV Additional District Judge, Warangal. There shall be no order as to costs.

25. The miscellaneous petitions if any pending in this second appeal shall stand closed.

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(T.SUNIL CHOWDARY, J)

04th April, 2014.

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